IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA Respondent, v. WINSTON BRITTON, a/k/a CARL HARRISON, a/k/a "JAMAICAN RICK," Petitioner.	)	Criminal Action No. 98-55-SLR Civil Action No. 99-159-SLR

Winston Britton, Federal Correctional Institution, Fort Dix, New Jersey. Petitioner, pro se. John P. Deckers, Esquire, Wilmington, Delaware. Counsel for petitioner.[1]

Richard Andrews, Acting United States Attorney and April Byrd, Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Attorneys for the United States of America.

MEMORANDUM OPINION

Dated: June 5, 2001
Wilmington, Delaware

[1]Mr. Deckers was appointed to represent petitioner at an evidentiary hearing on June 15, 2000.

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner, Winston Britton, is incarcerated in the State of New Jersey at the federal correction institution at Fort Dix. (D.I. 28) On March 15, 1999, he filed a pro se motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence based on the government's alleged breach of the plea agreement and counsel's alleged ineffective assistance. (D.I. 28) Pursuant to a court order, the government has responded to petitioner's motion. (D.I. 32, 33) On June 15, 2000, the court ordered an evidentiary hearing to resolve specific factual issues raised in petitioner's motion. (D.I. 38, 47) For the reasons stated below, the court shall deny petitioner's motion.

II. BACKGROUND

A. Indictment, Information, and Plea

On April 28, 1998, a federal grand jury in the District of Delaware returned a five-count indictment charging petitioner with conspiracy to distribute cocaine base (count I), conspiracy to money launder (count II), and money laundering (counts III-V). (D.I. 2) According to count II of the indictment, petitioner conducted financial transactions "to wit, (a) the movement of funds across state lines by wire, specifically, through Western Union; (b) the purchase of a vehicle in New York . . . ; and (c) the purchase of real property in Florida." (D.I. 2 at 2)

Petitioner subsequently waived indictment and on June 11, 1998, pled guilty pursuant to a plea agreement to a one-count Information charging him with conspiracy to money launder. (D.I. 14; D.I. 33 at A10-13) The Information provided in relevant part:

> During the period of this conspiracy, defendant wired from Delaware and elsewhere funds via Western Union, said funds totaling approximately $97,000.00 and representing the proceeds of cocaine base sales, to the unindicted coconspirators/suppliers of cocaine base located in states other than Delaware.

(D.I. 14 at 2)

During the change of plea hearing, the following exchange took place:

> THE COURT: Has anyone made any promises to you that aren't contained in this written agreement?
>
> THE DEFENDANT: No, your Honor.
>
> THE COURT: And has anyone threatened you or forced you to enter into this agreement?
>
> THE DEFENDANT: No, your honor.
>
> THE COURT: All right. Do you understand that this is the time to tell me of any promises that aren't of record or of any threats made, that you will not be able to withdraw your plea of guilty at a later time based on information that you could have told me today? Do you understand that?
>
> THE DEFENDANT: Yes, I do.
>
> * * *
>
> THE COURT: And you understand there will be a presentence investigation, that both you and the Government will have the opportunity to participate in that presentence report. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. Do you understand . . . that both you and the Government will have an opportunity to challenge the facts both during the presentence investigation and at sentencing itself. Do you understand you have the right to discuss this with the Court during the process and at the time of sentencing?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. And have you and your attorney had the opportunity to discuss how the sentencing guidelines might apply in your case?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, I know you and the Government have come to some decisions about how the sentencing guidelines might apply. That's apparent[] through your memorandum of plea agreement. But do you understand that ultimately if the sentence I impose is more severe than you expected that you will still be bound by your plea of guilty and will have no right to withdraw it? Do you understand that?

THE DEFENDANT: Yes, your Honor.

(D.I. 25 at 9-11)

B. Sentencing and Appeal

On September 9, 1998, the court sentenced defendant to 51 months of imprisonment and a term of 3 years supervised released. (D.I. 22) In calculating petitioner's sentence, the court relied in part on the presentence report ("PSR"), which calculated the value of the funds at issue as exceeding $100,000. (D.I. 24 at 2) In accordance with the relevant sentencing guidelines, therefore, the court made a one-point upward adjustment in petitioner's offense level. (D.I. 24 at 2) No objections were

filed to the PSR by either the government or petitioner. (D.I. 24 at 3) During the sentencing hearing, both petitioner and his counsel indicated to the court that petitioner had cooperated with the government. (D.I. 24 at 4-5, 8) A notice of appeal was not filed with the Third Circuit.

C. Evidentiary Hearing

Petitioner's evidentiary hearing was directed to the issue of whether counsel offered ineffective assistance by failing to file an appeal and by failing to object to the government's use of "unlawfully gained information." At the hearing, petitioner was represented by counsel. Both petitioner's habeas counsel and respondent's counsel questioned petitioner's trial counsel. Petitioner took the stand as well.

Petitioner testified[2] that both he and his counsel were disappointed in the sentence given by the court. When asked during direct examination whether he discussed his post-sentence remedies with his counsel, petitioner replied:

> A: When she said it was not fair, I could have been given a better sentence, I said can we file an appeal? She said the judge didn't do anything wrong. The judge, my guideline was 41 to 51 months and the judge sentence me to 51 months, and there is no sense of appealing.
>
> Q: When she told you there was no sense in appealing,

[2]Petitioner's trial counsel testified first, petitioner testified next, and counsel was then called as a rebuttal witness. Because petitioner bears the burden of proof, his testimony is presented first.

did you have any response to her?

A: Yes.

Q: And what was that?

A: I told her I wanted to appeal and let the judge decide that.

* * *

Q: When you said I want you to file an appeal, what did [your attorney] say to you?

A: She said she didn’t see any sense in it, but she is my attorney, and if that’s what I want, then she will file an appeal.

Q: Okay. And is that how you left it?

A: And she said she was impressed with my speech and we spoke about some writer or some – you know, she ask me about a book. I can’t recall the name of the book. And she said she was gonna get the book and wherever I am, she send the book to me. So she made two promises: She made the promise she was going to appeal and send me a book.

Q: Okay. What was your understanding as to how much time you had to file an appeal?

A: At the end of sentencing, the judge told if we wish to appeal, we have 10 days in which to do so.

Q: And what was your understanding at the conclusion of your meeting with [counsel] who was going to file that appeal?

A: That she was going to file the appeal within that time frame.

Q: Did she indicate whether she thought that appeal had any merit or not?

A: She specifically tell me she don’t think it have any merit but she was going to do it just because I am requesting it.

Q: Did you think you had any obligation to follow-up and to file any documents on your own behalf?

A: No.

Q: Did you think you had any obligation to communicate with [your attorney] in writing or verbally that you wanted her to file an appeal.

A: Oh yeah. They take me back to Gander Hill [Prison] and it was overcrowded so it was basically down in receiving. Phone call was really hard to come by, but on Friday[3] I was given a phone call. And I try calling the office with no success because I don't know if they were accepting the calling card or I wasn't reaching anyone because I was trying to call collect but it was not accepted on Friday. . . . So on Friday, I eventually got a call.

Q: And what did you intend to communicate to her had you gotten through?

A: In my 10 days, to find out if she appealed.

(D.I. 47 at 73-76)

Petitioner went on to detail other attempts he allegedly made to contact his attorney at her office and at home. When he tried the office, petitioner either did not get through or spoke with the secretary. When he spoke with the secretary, he left his name saying he would call back but did not otherwise leave a message. When he reached her home number, petitioner testified that he left a message on her answering machine to "remind her we got 10 days in which to make an appeal, if she didn't do so at the time." (Id. at 76-79) Petitioner testified that he again tried to call his attorney two or three months later to request transcripts. (Id. at 79-80) According to petitioner, these

[3]Petitioner was sentenced on Wednesday, September 9, 1998.

later attempts were also unsuccessful because "every time I call, she just stepped out of the office or she is not in at the moment." (Id. at 80) Petitioner then wrote counsel regarding the court transcript, and she wrote him back. This was the first direct communication between the two since the day of sentencing. (Id.)

On cross examination, petitioner admitted that he had no calling card or other records of his attempts to contact counsel. Counsel for respondent questioned petitioner why he made so many attempts to contact his attorney to make sure she filed the appeal when he left the sentencing with the understanding that she would file the appeal. He responded "just to make sure she knows we got 10 days to do so."

Petitioner's counsel testified in great detail about the efforts made by her in investigating the facts of the case leading to petitioner's plea and in researching the sentence issues leading to a reduction in his sentence. (Id. at 16-24) During discovery, the government provided counsel with an investigative report detailing the evidence the government had gathered. (Id. at 22) Counsel testified that she went through the report with petitioner line by line. (Id. at 24) Counsel and petitioner discussed the evidence, a proposed plea agreement, and a possible proffer by petitioner. (Id. at 26) Prior to making a proffer, counsel met with petitioner in person on three different occasions and talked to him on the phone another time.

(Id. at 28) Counsel testified that she kept the highlighted and marked up versions of the documents she went over with petitioner. (Id. at 25)

After making two proffers and entering a plea agreement, counsel received the presentence report. She met with petitioner once and reviewed the report during "several phone calls." (Id. at 31) Although the government agreed in the plea agreement to stipulate that the total value of the funds laundered by petitioner was $100,000 or less, the presentence report set the value over $100,000. Counsel testified that after discussing the issue with petitioner, they decided not to pursue it with the presentence officer for fear of "opening the floodgates" to other money laundering that could put the total above $200,000. (Id. at 26, 34)

Petitioner was sentenced at the high end of the sentencing guidelines. Counsel testified that after the sentencing she and petitioner

> talked about whether or not an appeal would be successful. I told him I did not think that it would be, for all the reasons I had discussed before with him. This was not the first time we talked about the possibility of an appeal. This was a conversation confirming what I told him before sentencing. And that is, you know, if it works out this way, these are your options. And we had been over it.
>
> And at the conclusion of the discussion, I said, again, you know, if you want me to appeal, I'll appeal. I don't think you are going to win. And if I appeal, I'm going to file what is called an Anders brief which basically I, as an officer of the court, say I don't think there are meritorious grounds for appeal, but I'll file it, and you will get other counsel, and your

appeal rights will be preserved.

(Id. at 37-38)

Counsel went on to testify that after the sentencing, she and the petitioner were disappointed with the sentence, but the petitioner did not instruct her to file an appeal. (Id. at 39) On cross examination, petitioner's habeas counsel had the following exchange with counsel:

> Q: Okay. You said when you left [the post sentencing meeting with petitioner], you knew he did not want to file an appeal. How is it that you knew he did not want to file an appeal?
>
> A: Because the last thing I said to him was tell me what you want to do. And he said forget it, I don't want to file an appeal.
>
> Q: Did you follow-up your discussion with Mr. Britton with any written correspondence?
>
> A: No, I did not. What I told him is call me. You know how to reach me. Call me. If anything changes, let me know. And I did not hear from him. But I did not follow-up with any written correspondence. I didn't know where he was going to go, frankly.

(Id. at 59)

On redirect, counsel testified that she told petitioner that he had ten days to appeal his decision. (Id. at 61) Counsel did not hear from petitioner until "months later." (Id. at 62) As a rebuttal witness, counsel testified that she did not hear from petitioner at all during the ten days following his sentence. She noted that her office had a policy in place where she was to be made aware of any attempts to contact her by clients who were

incarcerated. (Id. at 91) She also explained that in a previous case, one of her clients was attempting to get in touch with her after sentencing but she could not get a hold of him. Although she did not know what he wanted, she filed an appeal on his behalf "in an abundance of caution." (Id. at 92)

III. DISCUSSION[4]

A. Breach of the Plea Agreement

Petitioner argues that the government breached the terms of the plea agreement (1) by forwarding self-incriminating information gained during plea negotiations to the presentence officer and (2) by reneging on its promise to file a Substantial Assistance Motion. As the Supreme Court recognized in Mabry v. Johnson, 467 U.S. 504 (1984),

> when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Id. at 509 (quoting Santobello v. New York, 404 U.S. 257, 262 (1971)). The Court of Appeals for the Third Circuit has directed that "[t]he Government must adhere strictly to the terms of the

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[4]On April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") was signed into law, amending the standards by which courts review § 2255 motions. See Pub. L. No. 104-132, 110 Stat. 1214 (1996). Since petitioner filed his habeas petition in March 1999, following the enactment of AEDPA, the court shall apply the amended standards set forth in AEDPA to petitioner's claims for relief under § 2255.

bargain it strikes with defendants." United States v. Miller, 565 F.2d 1273, 1274 (3d Cir. 1977); accord United States v. Moscahlaidis, 868 F.2d 1357, 1361 (3d Cir. 1989); United States v. Huang, 178 F.3d 184, 187 (3d Cir. 1999). In addition, the Third Circuit has mandated that a plea agreement must be interpreted "in the context of the circumstances under which it was formulated and general principles of the interpretation of contracts." Huang, 178 F.3d at 188; see also Moscahlaidis, 868 F.2d at 1361 ("Although a plea agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract-law standards."); United States v. Nolan-Cooper, 155 F.3d 221, 235 (3d Cir. 1998) ("In determining whether the plea agreement has been breached, courts must determine 'whether the government's conduct is inconsistent with what was reasonably understood by the defendant when entering the plea of guilty.'") (quoting United States v. Badaracco, 954 F.2d 928, 939 (3d Cir. 1992)). The agreement also must be construed within the confines of the Sentencing Guidelines and applicable sentencing laws. See Huang, 178 F.3d at 188. Thus, a court charged with assessing whether a plea agreement has been violated must consider: (1) the terms of the agreement and the conduct of the government; (2) whether the government's conduct violated the plea agreement; and (3) the appropriate remedy if a violation has occurred. See Moscahlaidis, 868 F.2d at 1360. The petitioner has the burden of proving by a preponderance of the evidence that the government

breached the plea agreement. See Huang, 178 F.3d at 187.

1. Forwarding of self-incriminating information

As stated above, petitioner first claims that the government forwarded self-incriminating information to the presentence officer in violation of the plea agreement. In paragraph 3 of the Memorandum of Plea Agreement, the parties agreed that

> the value of the funds laundered by defendant was $100,000.000 or less. SG 2S1.1. The parties' agreement reflected in this paragraph does not bind the Court or the presentence officer. Defendant recognizes that if the Court or the presentence officer disagree with the agreement reflected in this paragraph, the defendant will not be allowed to withdraw his guilty plea.

(D.I. 33 at A11) Petitioner alleges that the government breached its obligation in the plea agreement by forwarding information gained during off-the-record proffers to the presentence officer. Specifically, petitioner asserts that information concerning his purchase of a BMW car in New York and real estate in Florida, of which he contends "the Government had no knowledge" prior to plea negotiations, was used to enhance his sentence. (D.I. 28 at 5)

Petitioner has failed to show that the government's conduct violated either the letter or spirit of the plea agreement. There is no evidence that the government provided the probation officer with the alleged self-incriminating information. Moreover, the record reveals that this information was known to the government prior to its plea negotiations with petitioner and, thus, was not gained during confidential, off-the-record

proffers. In addition, this information was reported in public documents (e.g., the indictment) accessible to the presentence officer. Finally, petitioner was made aware at the June 3, 1998, change of plea hearing that the court was not bound by any decisions reached by the parties as to how the sentencing guidelines might apply to petitioner and that petitioner could not withdraw his guilty plea if the sentence imposed was more severe than he expected. (D.I. 25 at 10-11)

Having reviewed the record at bar, the court finds nothing indicating that the presentence officer's conclusion that the monies used to purchase the BMW and Florida property were in addition to the value of the laundered funds agreed to by the parties is attributable to any act on the part of the government. To the contrary, the record indicates that the government's conduct was consistent with what was reasonably understood by petitioner when he entered his guilty plea. The court concludes, therefore, that the government satisfied its obligation under the plea agreement. Accordingly, petitioner's request that the "extra point" used to enhance his sentence be deducted is denied.[5]

2. The government's refusal to move for a downward

[5]Although petitioner contends that the calculation of the money laundered in the PSR is inaccurate, he has not presented any evidence in support of that contention. In the absence of such evidence, the PSR bears sufficient indicia of reliability to permit the court to depend on it. See United States v. Patten, 40 F.3d 774, 777 (5th Cir. 1994).

departure

Petitioner also alleges that the government reneged on its promise to move for a downward departure. Section 5K1.1 of the Federal Sentencing Guidelines states that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." U.S.S.G. § 5K1.1 (2000). In the instant action, paragraph 5 of the Memorandum of Plea Agreement provides that

> [t]he defendant agrees to fully cooperate with federal and state law enforcement officers and prosecutors, and to testify truthfully at any and all subsequent proceedings in which he is called as a witness. Defendant agrees and understands that statements made by him during debriefings do not constitute substantial assistance. If the United States concludes that defendant has provided substantial assistance in the investigation and prosecution of other persons, the United States will file with the Court a notice under Title 18, United States Code, Section 3553 and Section 5K1.1 of the Sentencing Guidelines. This notice will permit, but not require, the Court to depart from the statutory mandatory minimum and the Sentencing Guidelines, and to impose a sentence below that which would otherwise be called for by the statute and Sentencing Guidelines. Defendant agrees and understands that the United States' evaluation of his cooperation and the decision whether to file a notice under Title 18, United States Code, Section 3553 and Section 5K1.1 will be exclusively made by the United States and is not subject to review.

(D.I. 33 at A12)

In United States v. Isaac, 141 F.3d 477 (3d Cir. 1998), the Third Circuit held that the government's refusal to move for a downward departure under a written plea agreement giving it "sole

discretion" to determine whether the defendant's assistance was substantial was reviewable by district courts for "bad faith." Id. at 484. The Third Circuit further articulated that "[t]he sole requirement is that the government's position be based on an honest evaluation of the assistance provided and not on considerations extraneous to that assistance." Id.; see also United States v. Rexach, 896 F.2d 710, 713 (2d Cir. 1990) ("Thus, where the explicit terms of a cooperation agreement leave the acceptance of the defendant's performance to the judgment of the prosecutor, the prosecutor may reject the defendant's performance provided he or she is honestly dissatisfied."). The Third Circuit's reasoning adopted the approach taken in United States v. Imtiaz, 81 F.3d 262, 264 (2d Cir. 1996):

> [T]o trigger judicial review of the prosecutor's decision, the defendant "must first allege that he . . . believes the government is acting in bad faith." United States v. Khan, 920 F.2d 1100, 1106 (2d cir. 1990, cert. denied, 499 U.S. 969, 111 S.Ct. 1606, 113 L.Ed.2d 669 (1991). The government "may rebut this allegation by explaining its reasons for refusing to depart." [United States v. Knights, 968 F.2d 1483, 1487 (2d Cir. 1992).] If the government explains its reasons, the defendant must "make a showing of bad faith to trigger some form of hearing on that issue." Id. (internal quotation marks omitted). Unless the government's reasons are wholly insufficient, id. at 1487-89, or unless the defendant's version of events, supported by at least some evidence, contradicts the government's explanation, see United States v. Leonard, 50 F.3d 1152, 1157-58 (2d Cir. 1995, no hearing is required.

Id. at 264.

In the instant action, petitioner alleges that the

government acted in bad faith when it failed to file a § 5K1.1 motion. Specifically, petitioner maintains that his cooperation enabled the government to indict and convict Michael Johnson, an important target of its investigation. (D.I. 28 at 13-16) In response to this allegation, the government has presented a legitimate, objectively reasonable ground for not filing the § 5K1.1 motion, i.e., that, inter alia, the information provided by petitioner did not play a part in the arrest of the alleged target on state charges.[6] (D.I. 33 at 5, A29) Additionally, the government avers that although there was a "Michael" discussed during debriefings of petitioner, that individual's last name was not Johnson. (D.I. 33 at 5)

Given the "substantial weight" that is to be given "to the government's evaluation of the extent of the defendant's assistance", U.S.S.G. § 5K1.1, comment. n.3, the court cannot say that the government has failed to advance a "facially plausible reason" for not filing a motion for reduction. Isaac, 141 F.3d at 484. Petitioner has not proffered any evidence refuting or contradicting the government's explanation; he simply reasserts

[6]The government also asserts that it did not promise petitioner it would file a § 5K1.1 motion and that petitioner's guilty plea did not "'rest in any significant degree on a promise or agreement of the prosecutor [concerning a sentence reduction], so that it can be said to be part of the inducement or consideration." (D.I. 33 at 4 (quoting United States v. Hayes, 946 F.2d 230, 233 (3d Cir. 1991)). As these assertions do not explain the government's "refus[al] to depart," the court will not consider their veracity.

his allegation that his cooperation was such that he is entitled to relief.[7] (D.I. 35, ¶ 2) In the absence of such evidence, the court holds that petitioner has failed to show that the government acted in bad faith.

B. Ineffective Assistance of Counsel

The Sixth Amendment provides that an accused has the right to the assistance of counsel in all criminal proceedings. U.S. Const. Amend. VI. This right has been interpreted as including the right to effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, petitioner must show both that (1) his counsel's performance fell below an objective standard of reasonableness and (2) there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See id. at 686; Burger v. Kemp, 483 U.S. 776, 788-89 (1987); Darden v. Wainwright, 477 U.S. 168, 184 (1986); Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). The burden of proving a claim of ineffective assistance of counsel rests upon the petitioner. See Government of Virgin Islands. v. Nicholas, 759 F.2d 1073, 1081 (3d Cir. 1985).

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[7]Petitioner avers that the government "was only able to effectuate [the target's] indictment and conviction because of the substantial amount of critical information pertaining to the inner workings of [the target's] drug dealings with which [he] provided them." (D.I. 28 at 16) Petitioner, however, has failed to supply the court with any evidence in support of this assertion.

In the instant action, petitioner alleges that after being sentenced he requested his counsel to file a notice of appeal but she failed to do so.[8] (D.I. 28 at 17-20) The Supreme Court has "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). According to the Supreme Court,

> a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

Id. On the other hand, a petitioner has the ultimate say in whether to appeal, and an attorney need not appeal in the face of explicit instruction to refrain from so doing. See id.

Whether a given defendant has made the requisite showing that counsel's deficient performance deprived him of an appeal he otherwise would have taken turns on the facts of the particular case. See id. at 479-80, 484-86 (requiring defendants who assert that counsel was constitutionally inefficient for failing to file a notice of appeal to establish ineffective assistance of counsel

[8]Petitioner also alleges that counsel was ineffective because she failed to object to (1) the PSR money laundering calculation and (2) the government's refusal to file a § 5K1.1 motion despite the fact that both violated the terms of the plea agreement. (D.I. 28 at 20-23) As noted above, petitioner has failed to establish these underlying substantive claims. Accordingly, counsel's "failure" to argue that the government breached the plea agreement does not constitute ineffective assistance.

under Strickland). The determinative question relative to the first prong of Strickland, i.e., the reasonableness of counsel's conduct, is whether the attorney had a duty to consult with defendant about the advantages and disadvantages of appeal and, if so, did she follow defendant's express instructions about an appeal. See id. at 478. Counsel has a

> constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Id. at 480. In making this inquiry, courts are instructed to consider all the information counsel knew or should have known. See id. A guilty plea is a "highly relevant factor in this inquiry" as it reduces the scope of potentially appealable issues and indicates a desire to end judicial proceedings. Id. However, even in those instances where a guilty plea was entered, "the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Id.

In this context, in order to satisfy the second prong of Strickland, i.e., prejudice, a defendant need only demonstrate that "but for counsel's deficient conduct, he would have appealed." Id. at 486. He need not demonstrate that "his hypothetical appeal might have had merit." Id. at 483, 486

(stating that where counsel's alleged deficient performance denies a defendant access to "the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right" a presumption of prejudice exists without "further showing from the defendant of the merits of his underlying claims"). As with the first prong, evidence that nonfrivolous grounds for appeal existed or that the defendant promptly expressed his desire to appeal are "often highly relevant in making this determination." Id. at 485. Evidence that a defendant demonstrated to counsel his desire to appeal, however, is insufficient on its own "to establish that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal." Id. at 486.

In the instant action, whether petitioner instructed counsel to file an appeal is a highly factual and disputed issue. After hearing the parties and reviewing the record of the evidentiary hearing, the court finds counsel's version of events to be the more credible version. With the exception of the decision to file an appeal, counsel's and petitioner's stories are consistent right down to shared disappointment during their meeting following the sentencing. The court notes that petitioner was able to communicate with counsel by telephone and letter both before the sentencing and after the window of opportunity to file the appeal, as demonstrated by the detailed records of all

interaction with petitioner counsel kept in her file. Petitioner bears the burden of proving that he communicated to her, or attempted to communicate to her, his desire to appeal. In the absence of any evidence other than his allegations that he instructed counsel to file an appeal, the court holds that he has not met his burden.

Because the court held above that the government did not breach the plea agreement, the court need not discuss petitioner's claim that counsel was ineffective by not objecting to "unlawfully gained information."

IV. CONCLUSION

For the foregoing reasons, the court concludes that petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 lacks merit. Petitioner's motion shall be denied. An appropriate order shall issue.